Supreme Court, U.S.
FILED
MAR 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

O'GWEN L. KING
DOROTHY C. KING,
Petitioners

vs.

RELIANCE INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL A. DESSOMMES, Esq, of
O'GWEN L. KING, P.A.
730 Bayfront Pkwy, Ste 4-A
Pensacola, FL 32501
(904) 438-5616
Counsel for Petitioners

TABLE OF CONTENTS

Table of Authorities.....I.

Argument in Reply to Respondent's Reasons for Denying Writ in its Brief in Opposition to the Petition for Writ of Certiorari....1 - 7

Appendix "A"..... 8 - 9

Appendix "B".....10

TABLE OF AUTHORITIES

Federal Rule of Civil Procedure 60(b).....5 - 7

No. 87-1353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

O'GWEN L. KING
DOROTHY C. KING,
Petitioners

vs.

RELIANCE INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Petitioners submit the following argument in response to Respondent's argument for denying the Petitioners' application for Writ of Certiorari.

Argument

In its Brief in Opposition to the Petition for Certiorari, Respondent, Reliance Insurance Company, makes a new contention in support of its position that the release of Respondent's claims against Petitioner was conditional upon the actual receipt of money, albeit that the release stated that it was given in consideration for an irrevocable Letter of Credit.

Petitioners feel that these assertions cannot go unchallenged. They are found in Respondent's brief on page 3, 4, and 6, and allude to a supposedly contemporaneous execution by the parties of the original Settlement Agreement dated November 8, 1984 and the Release dated November 19, 1984.

This attempt to impress upon the

Court a contemporaneous character to the Settlement Agreement (see Appendix G, Petition for Certiorari) and the Release (See appendix I, Petition for Certiorari) is to lend weight to the Respondent's position that the release was conditional upon all of the payment requirements of the Settlement Agreement dated November 8, 1984 being fulfilled. It is Petitioners' position, that the giving of the Letter of Credit as express consideration for the Release, which Release and Letter of Credit were dated November 19, 1984, fulfilled the payment obligations stated in the original Settlement Agreement under date of November 8, 1984. The time frame in which these various documents were executed will likewise support

Petitioners' position.

In actuality, the Petitioners signed the Release and Settlement Agreement on November 19, 1984, but the Settlement Agreement was agreed to as of November 8, 1984, and executed by Reliance (through its agents) and forwarded to Pensacola, Florida, by Reliance's counsel on November 8, 1984 (see excerpts from transcript of evidentiary hearing attached to this brief as Appendix "A").

The parties proceeded under that Settlement Agreement, through November 19, 1984, at which time the Kings executed all documents and the Letter of Credit was conceived of, delivered and the Release was granted therefor.

Moreover, the Court was notified of

a pending settlement agreement, not after the release was executed, but prior thereto, between November 8, and November 19, 1984 (see excerpt from transcript, Appendix "B" attached.).

But the issue of whether the release was conditional is not the real issue before this Court, because a careful reading of the District Court's Order reinstating the original action, (Appendix D, Petition for Writ of Certiorari) shows that the Court reinstated the original action on either of two alternative grounds: the first was a failure of consideration for the release, and the Court's rationale for said failure of consideration was abandoned by the Respondent in its brief filed on appeal to the Eleventh Circuit

Court, as indicated in the Petition for Certiorari. This left the remaining ground for the Court's Order; to wit, the alternative ground employing Federal Rule of Civil Procedure 60(b).

Since the Eleventh Circuit Court of Appeals affirmed Per Curiam and without reasons, the only logical assumption is that the Court found this Rule 60(b) rationale viable, which is under attack by the Petition for Writ of Certiorari. But the District Court's 60(b) rationale was not based on an asserted conditional character of the Release, but rather upon a recission of a valid release.

Respondent in its reply brief to the Petition for Writ of Certiorari argues that this court should not be concerned with any erroneous

interpretation of Florida Law as to the applicability of a Florida doctrine of unilateral mistake as grounds for employing Rule 60(b) to set aside a release. However, the Court's interpretation of the doctrine of unilateral mistake amounts to an abuse of the Court's discretion under Rule 60(b). Rule 60(b) can only be applied upon the existence of equitable grounds recognized by the law, not created by the court. It is a very basic principle that the unilateral mistake must go to the formation of contracts, not to events subsequent to the contract's formation, to justify a recission.

The point that the Petitoners are urging to the Court's attention, and which the Respondent is attempting to divert from the Court's attention, is

that the District Court never did find a conditional release. The basis for the District Court's holding, was that either the release was not given for consideration (the rationale for this being abandoned by the appellee), or that it was rescindable, under Rule 60(b).

Respectfully submitted,

MICHAEL A. DESSOMMES, Esq. of
O'GWEN L. KING, P.A.
730 Bayfront Parkway
Suite IV-A
Pensacola, FL 32501
(904) 438-5616
Attorney for the Petitioners

Appendix "A"

Excerpt from Transcript of Evidentiary Hearing on July 26, 1983, before Honorable Roger Vinson, U.S. District Court Judge

Question to Mr. Crowder, testifying for Reliance Insurance Company [Respondent]:

Q. "Mr. Crowder, who prepared the settlement agreement?"

A. "Well, the settlement agreement was a joint effort between my office and Mr. Henson's office, but I think it was actually typed in my office."

Q. "Now would you explain the efforts that then followed for the execution of that instrument by the various parties."

A. "Once the agreement was reduced to writing in an acceptable form and signed by the respective parties, it was forwarded to - my signature appears on here for Reliance Insurance Company, but

it was forwarded to counsel here in Pensacola, Mr. Nickinson's office, to secure the signatures here. And he was involved with the actual obtaining of the signatures of the various parties listed from the Pensacola area"

Q. "Mr. Crowder, when did the subject of a letter of credit from the Kings first arise?"

A. "Well the agreement was executed by us around the 8th of November and then it was forwarded on for signature here. My recollection is that the subject of the letter of credit came up, if not the day the document was to be executed, the day before."

Transcript, pages 20 -21

Appendix "B"

Excerpt from Transcript of Evidentiary Hearing on July 26, 1983, before Honorable Roger Vinson, U.S. District Court Judge

By Mr. Smoak, attorney for Reliance Insurance [Respondent] in a statement to the Court:

"Mr. Crowder had notified the Court just before the discovery deadline cutoff on November 19th and advised you that an executory settlement of the matter had been reached and it was scheduled to become executed by approximately March 10th, 1984."

Transcript, pg. 14